Supreme Court, U.S.
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No. 88-1059

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

VROOM DEVELOPMENTS (FLORIDA), INC., *Appellant*,

v.

TOWN OF LONGBOAT KEY, *Appellee*.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

REPLY BRIEF IN OPPOSITION OF MOTION OF APPELLEE THE TOWN OF LONGBOAT KEY TO DISMISS OR AFFIRM

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February 1989

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Pursuant to Rule 16.5, appellant, VROOM DEVELOPMENTS (FLORIDA), INC. files this Reply Brief in Opposition to Motion of Appellee THE TOWN OF LONGBOAT KEY to Dismiss or Affirm ("Motion to Dismiss") (referenced as M.D. p. _____ in this brief).

Appellee's Motion to Dismiss distorts and obfuscates the questions presented to this Court by appellant in its Jurisdictional Brief. The facts of the case are simple. Appellee enacted an Ordinance. The Ordinance was enacted "to ensure that future land development within the Town of Longboat Key preserves or provides land in its natural state for parks, open space and land for specified town purposes. . . ." Ordinance No. 80-1, Section 2(A), J.S. app. p. 28a. Concurrent with the adoption of Ordinance 80-1, the Town adopted a map entitled "Open Space Master Plan" ("Map"). *Id.* The Map's purpose was to inventory "land recommended for acquisition by the Town." *Id.* The Ordinance requires any new development either to dedicate land inventoried on the Map or to pay a fee in lieu of dedication ("impact fee"). The requirement is imposed to offset the impact of new population.

Appellant agrees that dedicating designated open space or paying an impact fee to acquire the designated open space is related to the burden of increased population. The essence of this appeal is that developments with the same new population impact should be assessed the same impact fee. The cost of acquiring the land designated on the Ordinance's Map is the same for twenty-five (25) people living on expensive gulf-side property as it is for twenty-five (25) people living on less expensive bay-side property.

Appellee makes much of the fact that the actual fee assessed against appellant was less than the replacement cost of the lands currently being used by appellee for recreational purposes. Appellee ignores the fact that appellee itself created the standard of five (5) acres of land per one thousand new residents. Ordinance 81-27, Section 1(B)4(a), J.S. app., p. 37a. Replacement cost analysis has only one application: determining how many acres of land are needed to offset population increases. Appellee's replacement cost analysis argument is irrelevant to this appeal for two reasons: (1) the standard is set by the

Ordinance at five (5) acres per 1,000 persons (not the replacement cost ratio of fourteen (14) acres per 1,000 persons); and (2) the Ordinance does not call for the replacement of current parklands, but the acquisition of specifically designated land. Appellee has adopted an Ordinance stating that impact fees for parkland will be assessed based upon five (5) acres per 1,000 persons and now argues to this Court that their assessment of an impact fee nearly three times that standard meets constitutional muster because the fee assessed is less than the replacement value of currently used parkland (having a ratio of fourteen (14) acres per 1,000 persons). Appellee admits in its Motion to Dismiss that it charged appellant nearly fourteen (14) acres per 1,000 persons when the rate established by appellee in its Ordinance is five (5) acres per 1,000 persons.

Appellee also argues that the Map adopted in the Ordinance is only for "guidance". (M.D., pp. 2, 6). If the Map is only for guidance, why does appellee have to amend the Map to add dedicated lands not designated and delete an equal amount of designated lands? (*See* M.D. app. p. 25).

No state or federal appellate court has written on the issues presented in appellant's Jurisdictional Statement. None of the cases cited by appellee in its Motion to Dismiss have addressed the issues in this appeal. In fact, the Ordinance in the first case cited by appellee in support of its argument on page five (5) of the Motion to Dismiss does *not* require an in lieu fee calculated on the fair market value of the land being developed:

> The fee to be paid by a subdivider with less than fifty parcels is calculated not by the value of the land he would have been required to dedicate within a subdivision but by the value of the land in the portion of the local park required to serve the needs of the subdivision.

Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal.3rd 633, 94 Cal.Rptr. 630, 484 P.2d 606, 614 n. 11, cert. dismissed, 404 U.S. 878 (1971). That is precisely the application that appellant seeks in this case.

The issues raised in this appeal were not addressed in any of the other cases cited by appellee. In *Coulter v. City of Rawlins*, 662 P.2d 888 (Wy. 1983), the court stated, "The issue which we are asked to address is whether or not the City of Rawlins was empowered by the Wyoming Constitution and various statutes to enact and enforce the three ordinances in question." *Id.* at 894. The court went on to state, "The briefs and the propositions expressed at oral argument reflect that appellant is not challenging the reasonableness of the amount of the charges and is only concerned with the power of the City of Rawlins to adopt them." *Id.* at 894, n. 1. The issues before this Court have nothing to do with appellee's power to adopt the challenged ordinances. In *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979), the issues before the court were: (1) whether the city had the power and authority to adopt the Ordinance; (2) whether the dedicated land or fee in lieu thereof must exclusively benefit the created subdivision; (3) whether the requirements of the Ordinance constituted a "taking"; and (4) whether the requirements constituted a tax. *Id.* at 218. None of those issues are raised here. In *Collis v. City of Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976), both the state statute and the municipal ordinance were challenged as a "taking" without just compensation. 246 N.W.2d at 21-22. The state statute was also challenged as an improper delegation of authority to a municipality and the ordinance was challenged as outside the scope of the enabling legislation. *Id.* Again, none of those issues are the subject of this appeal. Finally, in *Brookhill Development, Ltd. v. City of Waukesha*, 99 Wis. 2d 485, 299 N.W.2d 610 (Wis. App. 1980), affirmed, 103 Wis. 2d 27, 307 N.W.2d 242 (1981), the issues were: (1) whether the municipality had the authority to enact the subject ordinance; (2) whether the Ordinance was properly enacted; (3) whether the ordinance could be applied to land outside the municipality's territorial limits; and (4) whether the developer was denied equal protection because the developer's interests were not represented during the enacting process. *Id.* Those issues are not present here.

Appellee miscites this Court's opinion in *Nollan v. California Coastal Commission*, _____ U.S. _____ , 107 S.Ct. 3141 (1987) for the proposition that this Court has addressed the issues raised in this

appeal as it relates to Florida's rational nexus test. (M.D., p. 8). The *Nollan* case dealt with whether a requirement to convey an easement for beach access resulted in a "taking" in violation of the Takings clause of the Fifth Amendment. That constitutional principle is not invoked here.

Appellee repeatedly characterizes this case as a "garden variety developer's dispute" (M.D., p. 2), a "common land use dispute" (M.D. p. 3), and a "common and unimportant developer's dispute" (M.D., p. 8). The Ordinance challenged in this case is characterized by appellee as a "typical ordinance" (M.D., p. 4). It is respectfully submitted that there is no better case upon which this Court can decide substantial federal Constitutional questions than a "common" dispute involving a "typical" ordinance. Plenary briefing, full argument on the merits, and a written opinion on the federal Constitutional questions presented in this appeal would provide guidance to every court in this nation called upon to address this admittedly ubiquitous situation. A decision by this Court outlining the federal Constitutional parameters of a "typical" ordinance would stem the tide of federal Constitutional challenges of impact fees and would have widespread precedental value.

Finally, appellee argues in its Motion to Dismiss that the federal Constitutional questions were decided by a Florida trial court and a Florida court of appeal, thereby implying that nothing more is needed. (M.D., p. 8). Appellee's argument fails to consider the Constitutional principle reiterated by this Court in *Cooper v. Aaron*, 358 U.S. 1 (1958):

> The federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land, and Art 6 of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Id. at 18.

CONCLUSION

It is respectfully submitted that appellant's Jurisdictional Statement has presented substantial federal Constitutional questions that warrant plenary briefing and argument on the merits before this Court.

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AFFIDAVIT OF SERVICE

STATE OF FLORIDA
COUNTY OF SARASOTA

On this day personally appeared Thomas F. Capshew, who was duly sworn and states that service of this Reply Brief in Opposition of Motion of Appellee the Town of Longboat Key to Dismiss or Affirm was made by regular U.S. Mail on this ____ day of February, 1989, pursuant to Rule 28.5(c) of the Supreme Court Rules, on Scott R. Christiansen, Esq., 700 Sarasota Quay, Sarasota, Florida 34236 and Nancy E. Stroud, Esq., 1900 Glades Road, Suite 350, Boca Raton, Florida 33431. All parties required to be served have been served.

_____

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SWORN TO and subscribed in my presence, this _____ day of February, 1989.

_____

NOTARY PUBLIC